

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JENNIFER RUTH SCIBILIA,

Defendant-Appellant.

UNPUBLISHED

December 18, 1998

No. 203997

Monroe Circuit Court

LC No. 96-027745 FC

Before: Murphy, P.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and was sentenced to twenty-five to fifty years' imprisonment. She appeals as of right. We affirm.

Defendant's conviction arises from the death of her three-year-old son. Defendant first argues that the trial court improperly denied her motion for a new trial on the ground that the prosecution withheld evidence from defense counsel. Specifically, defendant argues that a second autopsy performed on the victim was "likely ordered because there were problems with obtaining a conviction based on the first autopsy" and, therefore, "it is more than likely that the problems [with the first autopsy] were told to someone in the investigation." Defendant's argument that the prosecution failed to provide the defense with all exculpatory information or evidence is based on mere conjecture. Both pathologists reached the conclusion that the victim died as the result of a deliberate act that caused him to asphyxiate, consistent with either suffocation, smothering, or strangulation. Hence, the trial court did not abuse its discretion by denying defendant's motion for a new trial. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Defendant next argues that she was denied the effective assistance of counsel by defense counsel's failure to extensively cross-examine the pathologists. However, the record reveals that both pathologists were thoroughly questioned regarding whether the victim's other identifiable breathing conditions could have been responsible for his death. Although there were some differences in the pathologists' conclusions regarding the external examination and the amount of bruising and petechial

hemorrhages that the victim had, both doctors arrived at the conclusion that the cause of the victim's death was deliberate and denied that the victim could have died from asthma or pneumonia. Defendant has failed to show that there is a reasonable probability that, but for counsel's failure to more extensively cross-examine the pathologists regarding the differences they found in the external examination of the victim, the result of the proceedings would have been different. Thus, defendant has failed to overcome the presumption that she received effective assistance of counsel. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Defendant next asserts that the verdict was against the great weight of the evidence in light of her testimony that she was asleep when the victim died. We disagree. Overwhelming evidence that defendant caused the death of the victim was presented. Whether the jury believed that defendant was sleeping when the victim died, or whether the jury believed the extensive evidence that suggested that defendant caused the victim's death, depended upon the credibility of the witnesses. Resolving credibility questions is the exclusive province of the jury. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998); *People v DeLisle*, 202 Mich App 658, 662; 509 NW2d 885 (1993).

Lastly, defendant contends that the evidence was insufficient to support her conviction. We disagree. To support a verdict of second-degree murder, the prosecution must present sufficient evidence that there was (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Malice is defined as "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id.* at 464.

Here, eight witnesses testified that defendant was verbally and physically abusive to the victim. Two witnesses testified that defendant had threatened to kill the victim. While defendant was in jail one of her cell mates called defendant a baby-killer and defendant replied, "[y]ou killed one, too." One witness testified that on the night the victim died, the victim's nose and lips were flattened. A second witness also noticed that a little bit of the victim's nose was compressed on the night he died. A pathologist testified that the victim had died as a result of oxygen deprivation, consistent with either suffocation, smothering, or strangulation, and that the death was deliberate. Another pathologist testified that the victim's cause of death was asphyxia as the result of a homicide. Viewed in a light most favorable to the prosecution, this evidence is sufficient to permit a rational trier of fact to find beyond a reasonable doubt that defendant was guilty of second-degree murder.

Affirmed.

/s/ William B. Murphy

/s/ E. Thomas Fitzgerald

/s/ Hilda R. Gage